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W. Shelby McKenzie

INSURANCE

*W. Shelby McKenzie**

DIRECT ACTION

In *Esteve v. Allstate Insurance Co.*,[1] the Louisiana Supreme Court considered whether a direct action could be maintained against an insurer qualified to do business in Louisiana when the policy involved had not been issued or delivered in Louisiana and the accident had not occurred in Louisiana. The plaintiff, who was injured in a Florida accident, brought suit in Louisiana against Allstate, alleging that Allstate was liable for the negligence of its Florida insured. The majority opinion by Justice Marcus emphasized that the issue was not whether Louisiana courts had jurisdiction over Allstate,[2] but whether the right of action against Allstate was authorized under the Louisiana direct action statute.[3] Relying on its earlier analysis in *Webb v. Zurich Insurance Co.*,[4] the court concluded that the direct action statute was applicable to accidents in which (1) the policy was issued or delivered in Louisiana, or (2) the accident occurred in Louisiana. Since the *Esteve* accident met neither of these tests, the majority concluded that the plaintiff could not maintain a direct action against Allstate.[5]

Justice Tate, joined by Justices Calogero and Dennis, concurred and suggested that the direct action could be main-

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* Special Lecturer in Law, Louisiana State University; Member, Baton Rouge Bar.

1. 351 So. 2d 117 (La. 1977).

2. In connection with its qualification to do business in Louisiana, Allstate was required to appoint the Secretary of State as its agent for service of "all lawful process in any action or proceeding against such insurer." LA. R.S. 22:985 (1950).

3. 351 So. 2d at 118 n.3. *See* LA. R.S. 22:655 (Supp. 1962).

4. 251 La. 558, 205 So. 2d 398 (1967).

5. The plaintiff had also sued her host driver and her insurer, Maryland Casualty Company. Maryland was subject to a direct action since its policy had been delivered in Louisiana. However, Maryland's third party demand against Allstate for contribution met with the same fate as the plaintiff's suit. *See also* Morse v. Hartford Cas. Ins. Co., 301 So. 2d 741 (La. App. 3d Cir. 1974) and 326 So. 2d 390 (La. App. 3d Cir. 1976). Attempts to circumvent the limitations of the direct action statute through use of quasi-in-rem jurisdiction have also been unsuccessful. Kirchman v. Mikuka, 258 So. 2d 701 (La. App. 3d Cir. 1972).

tained in Louisiana if such action was authorized by *either* Louisiana or Florida law. Therefore, even if the Louisiana direct action statute did not authorize such a suit, there was no constitutional bar to Louisiana's enforcing a claim authorized by Florida law against a defendant who does business in Louisiana, even though the cause of action arose elsewhere. However, the concurring justices determined that Florida permitted joinder of the insurer only if joined as a co-defendant with its insured.[6] Since the insured was not a party to the *Esteve* suit, these justices concurred in the dismissal of the action against Allstate.[7]

LIABILITY INSURANCE—SETTLEMENT OF MULTIPLE CLAIMS

When multiple claimants are faced with inadequate policy limits, is each injured party entitled to a proportionate share of the policy limits according to the extent of his damages? This issue was presented to the Louisiana Supreme Court in *Holtzclaw v. Falco, Inc.*,[8] a case in which the insurer had exhausted its policy limits in settlement of other claims, leaving nothing for the plaintiff. On original hearing, the court held that the direct action statute granted to each injured party a right to a proportionate share of the policy limits which could not be prejudiced by the insurer's settlements with other claimants, expressly overruling its earlier decision in *Richard v. Southern Farm Bureau Casualty Insurance Co.*[9] However, on rehearing with two dissents, the court reinstated the *Richard* rule that the insurer may enter into reasonable and good faith settlements to be credited against its policy limits even though such settlements diminish or exhaust the insurance available to other claimants. Noting that the policy expressly gives the insurer the right to settle, the court further recognized the jurisprudential development of a duty on the part of the insurer to utilize this settlement right in good faith and with reason-

6. For this proposition the court relied on *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969). *See also* FLA. STAT. § 627.7262 (1976).

7. Justice Dixon dissented.

8. 355 So. 2d 1279 (La. 1978).

9. 254 La. 429, 223 So. 2d 858 (1969).

able care and skill for the protection of the interests of both the insured and the insurer. The court correctly concluded that this duty to protect its insured through settlement could not be reconciled with an additional duty to avoid preference among claimants.

On rehearing, the court held that the provisions of the direct action statute do not subordinate the insurer's right to settle to the claimant's right of action. The statute expressly provides that the action shall be "within the terms and limits of the policy," which terms include the express right to settle. The court further held that there is no language in the direct action statute which grants to an injured person ownership of or privilege upon a pro rata share of the insurance proceeds. Therefore, the insurer, acting reasonably and in good faith, can enter into settlements for the protection of its insured which may be credited in full against its policy limits.

The holding on original hearing and that suggested by the dissent, which would penalize the insurer with exposure beyond its policy limits for disproportionate settlements, is neither workable nor required by the direct action statute.[10] In the

10. A guaranteed share of the settlement proceeds would effectively eliminate in many instances the insurer's ability to negotiate the release of its insured from multiple exposures beyond the policy limits. In addition, the inability to determine the "share" of each claimant would preclude settlement with fewer than all claimants, since a mistake in evaluation would expose the insurer to judgment in excess of its policy limits. There are as many variations of theme as there are accidents resulting in exposure beyond the policy limits. However, for one example, suppose *A* was the driver and *B* and *C* were guest passengers in an automobile involved in an accident at an uncontrolled intersection with an automobile driven by *D*. *A* had the statutory right of way, but there is a serious issue whether his speed and inattention were contributing causes of the accident. *D* has automobile liability insurance with a single limit of $25,000 applicable to the accident. *A's* claim has a judgment value of $25,000, which may be defeated by his contributory negligence. *B's* claim is worth $25,000. The cause of *C's* disabling condition is in dispute, and his claim may have a judgment value of as little as $15,000 or as much as $30,000. Without a definitive judgment, how could the insurer determine the proportionate share of each claimant? If he were guaranteed a proportionate share, *B* would have little incentive to participate in a settlement with *A* and *C* unless he received the lion's share of the proceeds. However, if all claims could not be settled, it would clearly reduce the insured's excess exposure to settle any two of the claims, even if such settlements exhausted the policy limits. More importantly, this right to settle with fewer than all claimants usually gives the insurer the necessary leverage to negotiate settlement with all claimants. Most importantly, the clearly

absence of a definitive judgment with respect to each claim, it would be virtually impossible for an insurer to determine the proportionate disposition of the policy proceeds. On the other hand, litigation of all such claims is not only undesirable, but also deprives the insured of protection through settlement from multiple claims in excess of his policy limits. The holdings of *Richard* and *Holtzclaw* do place an injured party in jeopardy that his ultimate recovery may be diminished or precluded by settlements with other injured parties, but hopefully the recognition of this risk will result in a spirit of cooperation among claimants which will result in settlements that are in the best interests of the claimants, the insured and the judicial system.

The jurisprudence imposes the duty on the insurer to act reasonably and in good faith. However, the scope of this duty has not been defined in the very few cases in which settlements have been challenged.[11] The burden of proof is upon the party attacking the reasonableness or good faith of the settlement. In *Holtzclaw* the insurer had communicated with all potential claimants, asking them to submit their claims by a certain date. The plaintiff did not submit a claim for consideration within the deadline and therefore was not included in the settlement negotiated with the other claimants for the available policy limits. The supreme court held that the insurer had not acted unreasonably or without good faith "with respect to Holtzclaw."[12]

Does this analysis suggest responsibility on the part of the insurer to communicate with all claimants to afford them an opportunity to participate in the settlement? Because the issue can arise in so many varied factual situations, such a duty is not desirable. Cases will involve varying degrees of exposure beyond the policy limits, liability may be clear or disputed with respect to certain claimants or all claimants, and the amount of damages may be mutually agreed upon or strongly contested

inconsistent duties to protect the insured from excess exposure through settlement and to prorate the policy limits cannot reasonably be imposed on the insurer.

11. *See* Louisiana Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 348 So. 2d 1311 (La. App. 3d Cir. 1977); Jack v. Jack, 240 So. 2d 435 (La. App. 3d Cir. 1970). *See also* Wright v. Romano, 279 So. 2d 735 (La. App. 1st Cir. 1973).

12. 355 So. 2d at 1287.

as to certain or all of them. The reasonableness and good faith of the insurer should be judged solely in light of the insurer's duty recognized in *Richard* and *Holtzclaw* to use settlement for the protection of its insured—that is, to minimize as much as possible the exposure of the insured to liability beyond the policy limits. To accomplish this purpose, it may be to the insured's advantage either to exclude intentionally from settlement small or disputed claims if the major or indefensible claims can be settled or to settle some claims quickly even though all claimants have not been contacted. The duty of reasonableness and good faith should be used only to preclude either fraudulent depletion of the policy limits or settlements so grossly excessive as to unreasonably prejudice both the insured and injured party.

UNINSURED MOTORIST INSURANCE—SETTLEMENT OF MULTIPLE CLAIMS

Manieri v. Horace Mann Mutual Insurance Co.[13] considered whether an uninsured motorist carrier, faced with multiple claims in excess of its policy limits, was required to prorate the coverage among its insureds. The policy covered bodily injury to three persons involved in an automobile accident, two who were killed and the plaintiff who was injured. The insurer settled with the survivors of the deceased victims for $4,250 each and offered the remaining $1,500 to the plaintiff. The plaintiff contended that he was entitled to a larger share of the policy limits. The court of appeal correctly observed that the rationale of *Richard* and *Holtzclaw,* discussed above, was not applicable to uninsured motorist claims, because this coverage does not involve any duty to protect the insured from excess exposure through settlement. The coverage is for bodily injury damages which insureds are legally entitled to recover from an uninsured or underinsured motorist.[14] The court in *Manieri* expressed grave concern over whether the insurer should be able to favor one insured over another through settlement, but found in favor of the insurer on the ground that the settlements

13. 350 So. 2d 1247 (La. App. 4th Cir. 1977).
14. *See* LA. R.S. 22:1406(D) (Supp. 1977).

achieved substantial proration of the policy limits.

It seems inherently fair that all insureds should share proportionately when uninsured motorist limits are inadequate to fully compensate all insureds. However, such claims seldom can be computed with mathematical precision since they involve the difficult determination of damages for personal injury and wrongful death. In addition, coverage is based upon the legal liability of a third party which may well be a contested issue as to one or more insureds. Perhaps, without deciding the issue, *Manieri* offers the best solution. A rule which makes settlement precarious to the insurer is not desirable either for the insureds who want no impediment to the prompt processing of their claims or for judicial efficiency. *Manieri* suggests that the insurer has a duty to consider the interests of all its insureds, but the insurer has the discretion to decide upon and implement a reasonable distribution of the proceeds which achieves substantial proration. Since the issues of coverage, liability and damages can be disputed and most complicated, the insurer must be given wide discretion to determine each insured's fair share in order to encourage voluntary resolution of multiple claims.